IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CLYDE SIMMONS, PLAINTIFF,

VERSUS CIVIL ACTION NO. 3:94CV064-S-O

J. W. ABEL, Individually and as Councilman, City of Grenada; BILLY COLLINS, Individually and as Councilman, City of Grenada; GEORGE THORNTON, Individually and as Councilman, City of Grenada; BILL WILLIAMS, JR., Individually and as Councilman, City of Grenada; L. D. BOONE, JR., Individually and as Mayor of City of Grenada; KEN MIXON, Individually and as interim City Manager, City of Grenada; and The MUNICIPALITY OF GRENADA, DEFENDANTS.

MEMORANDUM OPINION GRANTING
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This cause of action is before the court on the motion of the defendants for summary judgment. The plaintiff filed this action pursuant to 42 U.S.C. § 1983 claiming that the defendants deprived him of due process and equal protection guaranteed by the Fourteenth Amendment when he was demoted from sergeant to patrolman.

Summary Judgment Standard

On a motion for summary judgment, the court must ascertain whether there is a genuine issue of material fact. Fed. R. Civ. P. 56(c). This requires the court to evaluate "whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of

fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 250 (1986). The United States Supreme Court has stated that "this standard mirrors the standard for a directed verdict...which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." Anderson, 477 U.S. at 250-51 (citation omitted). Further, the Court has noted that the "genuine issue" summary judgment standard is very similar to the "reasonable jury" directed verdict standard, the primary difference between the two being procedural, not substantive. Id. at 251. "In essence...the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict - `whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'" Id. at 252 (citation

omitted). However, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255.

Facts

On April 12, 1993, the plaintiff was dispatched to Fourth Street in Grenada, Mississippi, where an adult civilian was detaining an African-American juvenile. Officer George Douglas had taken custody of the juvenile and was interviewing Robert Laster and James Tindall when the plaintiff arrived. The juvenile stated that he had knocked on the door of some lady's house to see if he could cut her grass. When the lady began screaming, the juvenile quickly left. Tindall had seen the juvenile immediately after hearing a lady scream. Tindall then followed the juvenile until Laster drove up in his car and stopped the juvenile. Laster explained to Officer Douglas, or to both Douglas and the plaintiff, that the juvenile had not tried to escape when he approached him. It appears that the plaintiff heard Tindall state that the juvenile could not have had time to do everything of which he was being accused. The plaintiff decided that there was not enough evidence to charge the juvenile, and since the plaintiff was familiar with the youth, the officers escorted him to his home. The plaintiff

instructed the juvenile's parents not to allow him to roam from the house.

The plaintiff and Officer Douglas then proceeded to the home of Patricia Brasher. Brasher was extremely upset. It appears that the plaintiff attempted to ask her some questions, but only made matters worse. He left Brasher's home to allow Officer Douglas to complete the investigation. Outside the house, the officers were approached by a witness, who later stated that she had been treated rudely.

Brasher and Laster filed official complaints against the plaintiff. The Grenada police department conducted an investigation into the complaints. Additionally, there may have been allegations that the plaintiff was insubordinate because he had not delivered a written report to the investigator, although the report was found the next day in another supervisor's box. On April 27, 1993, the plaintiff was notified by Chief Simmons that he was demoted to patrolman based upon violation of 8.202 of the City of Grenada Personnel Policy and Procedure Rules and Regulation, being incompetency and inefficiency in the performance of his duties on April 12, 1993. The plaintiff sought review of this decision by the interim city manager, Ken Mixon. Mixon sustained Chief Simmons' decision. The plaintiff appealed his demotion to the Mayor and Councilmen of the City of Grenada. The four white councilmen present voted to uphold the previous decision by Mixon,

and the two African-American councilmen voted in opposition. The City of Grenada had hired the plaintiff as a patrolman on December 12, 1977, and promoted him to sergeant in 1985.

Discussion

I. Due Process Claim

The defendant first moved for summary judgment on the plaintiff's due process claim. The parties stipulate in the pretrial order that:

> 11. The City of Grenada, Mississippi's employment policies in effect at the time of plaintiff's demotion provided that plaintiff's employment was "subject to termination at any time, for any reason, with or without cause or notice."

In responding to the defendants' motion for summary judgment, the plaintiff did not brief the alleged deprivation of his due process. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993) (issues not presented and argued in brief are abandoned).

Additionally, the defendants cite the court to Whitehurst v. Abel, et al., slip op. Civil Action No. 3:93CV185-D-O (N.D.Miss. January, 12, 1995), where Judge Glen Davidson held that the identical employment policies did not create a property or liberty interest, and that employees under these policies of the City of Grenada were employed at will. The court notes that the Mississippi Supreme Court has held that provisions in employee handbooks which expressly assert that the policies do not alter the at-will status of the employees or create a legal employment

contract will be upheld as binding. See Hartle v. Packard Electric, 626 So.2d 106, 109 (Miss. 1993). The policies of the City of Grenada clearly state, as the parties have stipulated, that employees still have at-will employment status. The plaintiff has no property interest in continued employment, and thus does not have a due process claim. See Board of Regents v. Roth, 408 U.S. 564, 577 (1972) ("To have a property interest in a benefit, a person clearly must ... have a legitimate claim of entitlement to it."); Shawgo v. Spradlin, 701 F.2d 470, 474 (5th Cir. 1983). Accordingly, the defendants' motion for summary judgment on the due process claim is well taken.

II. Equal Protection Claim

Because Section 1983 incorporates the equal protection standards that have been developed in fourteenth amendment jurisprudence, in order to prevail the plaintiff must first prove that the defendants "**intended** to treat similarly situated persons differently on the basis of race." Castaneda v. Pickard, 648 F.2d 989, 1000 (5th Cir. Unit A 1981); see also Massachusetts v. Feeney, 442 U.S. 256, 272 (1979); Washington v. Davis, 426 U.S. 229, 239-42 (1976). "The equal protection clause of the fourteenth amendment requires the government to treat similarly situated individuals in a similar manner. In the context of public employment, the equal protection clause prohibits invidious

discrimination on the basis of the race or sex of the employee." Gutzwiller v. Fenik, 860 F.2d 1317, 1328 (6th Cir. 1988).

> When there is proof that a discriminatory purpose has been a motivating factor in the decision, [ ] judicial deference is no longer justified. The impact of the official action-- whether it 'bears more heavily on one race than another,' --may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when [it] appears neutral on its face.

Arlington Heights v. Metro. Housing Corp., 429 U.S. 252, 265-66 (1977) (quoting Davis, 426 U.S. at 265-66) (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

"[T]he burden shifts to the defendants to show by a preponderance of the evidence that [they] would have reached the same result even in the absence of the reprobated factor." Whiting v. Jackson State University, 616 F.2d 116, 122 (5th Cir. 1980) (citing Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274, 285-87 (1977)). The defendants must show that they would have demoted any police officer who acted in a similar manner. "Although an employer may penalize employee misconduct, it must apply the penalties equally." Portis v. First Nat'l Bank, 34 F.3d 325, 330 (5th Cir. 1994); see also Kientzy v. McDonnell Douglas Corp., 990 F.2d 1051 (8th Cir. 1993) (refusing to allow misconduct to negate discrimination where other employees were not disciplined for the same misconduct).

The plaintiff has submitted the statement of Patricia Brasher to support his response to the defendants' motion for summary

judgment. Ms. Brasher stated that: "Officer Simmons had an arrogant attitude toward me and I knew right then it was because I was a white woman," and that "Officer Simmons was questioning me like I was some dumb white woman. Had I been a black woman, I would have received better treatment from both officers." The plaintiff cites Portis v. First National Bank of New Albany, MS., 34 F.3d 325 (5th Cir. 1994), for the proposition that Ms. Brasher's statement is evidence of an equal protection violation. Portis does not support the plaintiff's case. In Portis the party who had made the derogatory statements which were submitted as evidence that the disparate treatment was based upon sex discrimination was a supervisor. Ms. Brasher is not a defendant or a policymaker for Grenada County. The plaintiff has failed to connect Ms. Brasher's statement with the alleged unconstitutional action taken by the defendants.

The affidavit of the plaintiff only recites the belief that Ms. Brasher's statement motivated the defendants to demote the plaintiff on unconstitutional grounds. "[G]eneralized testimony by an employee regarding his subjective belief that his discharge was the result of [] discrimination is insufficient to make an issue for the jury in the face of proof showing an adequate, nondiscriminatory reason for his discharge." Elliott v. Group Medical & Surgical Serv., 714 F.2d 556, 566 (5th Cir. 1983) (citing Houser v. Sears, Roebuck & Co., 627 F.2d 756 (5th Cir. 1980)); also see

Little v. Republic Ref. Co., 924 F.2d 93, 96 (5th Cir. 1991) (finding subjective belief of little value toward proving a prima facie case). The plaintiff has failed to produce more than a scintilla of evidence of racially motivated disparate treatment.

Additionally, the plaintiff has submitted a large number of disciplinary actions taken by the City of Grenada Police Department. He avers that he is the only officer ever to be demoted. He maintains that the decision to demote him was based on his race in violation of the equal protection clause. The plaintiff does not separate from the submitted stack any similar disciplinary actions based on similar employee misconduct. The race of the other officers reprimanded for similar misconduct construed as incompetency and inefficiency in the performance of duties can be an indicator of an equal protection violation. Without any proof of dissimilar action for similar conduct, the court cannot conclude that the plaintiff has created a question of fact as to the existence of a prima facie equal protection violation. Accordingly, the defendant's motion for summary judgment is appropriate.

In the alternative, the court addresses whether the defendants have immunity, and the viability of the claims against defendant L. D. Boone, Jr.

III. Legislative and Qualified Immunity

The defendants argue that any actions taken by them while acting as city councilmen are protected by absolute immunity.

Specifically, they seek the protection of legislative immunity. The plaintiff correctly argues that the councilmen were acting administratively, not legislatively, and thus, are not privileged to absolute immunity.

The doctrine of absolute immunity protects state legislators from suits brought under § 1983. Tenney v. Brandhove, 341 U.S. 367, 371 (1951); Hughes v. Tarrant County, 948 F.2d 918, 920 (5th Cir. 1991). It not only protects statewide legislators, but also regional and local ones. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 399 (1979); Hernandez v. City of Lafayette, 643 F.2d 1188, 1193 (5th Cir. 1981). Such absolute immunity has also been extended to protect nonlegislative officials who fulfill legislative functions. Hughes, 948 F.2d at 920; Minton v. St. Bernard Parish School Board, 803 F.2d 129, 135 (5th Cir. 1986); Hernandez, 643 F.2d at 1193.

The defendant councilmen can be encompassed by the protection of absolute legislative immunity, but it does not attach to all actions taken by them. Only those actions taken pursuant to legislative duties are protected by such immunity. Hughes, 948 F.2d at 920; Minton, 803 F.2d at 135.

> When an official possessing legislative responsibilities engages in official activities insufficiently connected with the legislative process to raise genuine concern that an inquiry into the motives underlying his actions will thwart his ability to perform his legislative duties, vigorously, openly, and forthrightly, he is not entitled to absolute immunity but only to qualified

> immunity grounded in good faith that is bestowed upon other government officials.

Hughes, 948 F.2d at 920 (citing Minton, 803 F.2d at 135). When first confronted with the dilemma of how to determine what acts are legislative and entitled to absolute immunity, and what acts are nonlegislative and entitled only to qualified immunity, the Fifth Circuit noted two tests used in other circuits for such a determination.

> The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts," such as "generalizations concerning a policy or state of affairs," then the decision is legislative. If the facts used in the decisionmaking are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on the "particularity of the impact of the state action." If the action involves the establishment of a general policy, it is legislative; if the action single[s] out specific individuals and affect[s] them differently than others, it is administrative.

Hughes, 948 F.2d at 921 (citing Cutting v. Muzzey, 724 F.2d 259, 261 (1st Cir. 1984)). The court in Hughes applied both of these tests.

Under both tests, the decision of the Councilmen of the City of Grenada in upholding the demotion of the plaintiff was administrative. The facts which the defendant councilmen based their decision were specific as to the plaintiff, and the ultimate impact of that determination was felt only by the plaintiff. Clearly, the plaintiff was singled out from the general population. The defendants do not have legislative absolute immunity.

Alternatively, the defendants claim that they are protected from the plaintiff's claims by qualified immunity. The defendants have been sued in both their individual and official capacities. Qualified immunity will only protect them, if at all, in their individual capacity. Lynch v. Cannatella, 810 F.2d 1363, 1371 (5th Cir. 1987); Universal Amusement Co., Inc. v. Hofheinz, 646 F.2d 996, 997 (5th Cir. 1981); see Monell v. Department of Social Services, 436 U.S. 658 (1978). Due to their status as public officials, the defendants are entitled to qualified immunity unless the constitutional right asserted by the plaintiff was "clearly established" at the time of the violation. Whether the law is clearly established turns upon whether "the contours of the right established are sufficiently clear that a reasonable official would understand that what he is doing violates that right." Thomkins v. Vickers, 26 F.3d 603, 606 (5th Cir. 1994); Click v. Copeland, 970 F.2d 106, 109 (5th Cir. 1992). The court has discussed the plaintiff's equal protection claim. It has been settled for many years that it is unconstitutional to treat individuals of different races who are similarly situated in a contrary manner. Without doubt, the defendants would **not** be protected by qualified immunity if the plaintiff had shown a race based equal protection claim.

IV. Dismissal of L. D. Boone, Jr.

The minutes of the Board of Mayor and Councilmen for the City of Grenada from the meeting on May 17, 1993, reflect that defendant

L. D. Boone, Jr. was not present and did not vote to sustain the allegedly racially motivated demotion. The plaintiff has not presented any proof of action by L. D. Boone, Jr. which connects him to the allegation in the complaint. Accordingly, L. D. Boone, Jr.'s motion for summary judgment is appropriate.

An order in accordance with this memorandum opinion shall be issued.

This the _____ day of March, 1995.

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CHIEF JUDGE